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IN THE

Supreme Court of the United States

October Term, 1942

No. 505

PAPER CONTAINER MFG. COMPANY,
Petitioner,

vs.

DIXIE-VORTEX COMPANY,
Respondent.

RESPONDENT'S REPLY.

CHARLES W. HILLS,
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Of Counsel.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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RESPONDENT'S REPLY.

Petitioner's statement of the facts on pages 2 to 7, inclusive, of the petition is inaccurate and omits certain important facts which should be considered.

Supplement to Facts Stated in Petition.

Petitioner's proposition numbered 4 on page 2 of its petition fails to point out that petitioner was endeavoring to maintain secrecy with respect to its operations, and that it was not until after the lower court permitted respondent to inspect petitioner's machines and operations (Rec. Vol. I, p. 22) that respondent was able to become fully advised with respect to petitioner's activities. When petitioner became fully convinced that it could no longer conceal its machines and methods, it stipulated the construction and operation of its machines (Plaintiff's Exhibit 35, Rec. Vol. II, p. 539, Introduced, Vol. I, p. 173),

and then respondent limited its charges of infringement (Rec. Vol. I, p. 99) to the four patents which were held valid and infringed by the lower court (Rec. Vol. II, p. 760).

Hulseman Not a Minority Stockholder.

On page 3 of its petition, petitioner incorrectly states Mr. Leo J. Hulseman's connection with Paper Cup Corporation. Mr. Hulseman was not a "*minority*" stockholder. Mr. Hulseman's connection with Paper Cup Corporation is quite fully set forth in his own testimony on pages 124 and 125 of Volume I of the record.

He there stated that he owned, outright, 49% of the capital stock of Paper Cup Corporation and that he caused two shares to be issued to his attorney, thus giving Mr. Hulseman and his attorney 51% of the capital stock. On pages 124 and 125 of the record (Vol. I), he testified that, before he formed Paper Cup Corporation, he had received an *exclusive license* from Smith and Bild covering the invention, and assigned that *exclusive license* agreement to Paper Cup Corporation in consideration for his capital stock. He testified that he paid *no cash* for that capital stock, and he turned in to the corporation, in addition to the license, a Smith and Bild machine subject to an indebtedness of $566.50.

On page 125 (Vol. I) he also testified that, after the corporation was formed, he made an arrangement with Smith and Bild to assign that invention to the corporation.

Beginning on page 134 of Volume I of the record, Mr. Hulseman identified his original exclusive license agreement with Smith and Bild; the assignment which Mr. Hulseman made to Paper Cup Corporation for his capital stock in that corporation; subsequent contracts between

Smith and Bild and Paper Cup Corporation, and the assignment of the invention and application for patent from Smith and Bild to the corporation.

The invention covered by those various documents is the invention which is covered by the Smith and Bild patent No. 2,203,510 which is here in controversy (Rec. p. 134, Vol. I).

Mr. Hulseman's original exclusive license agreement with Smith and Bild, which he assigned to the corporation (with the Smith and Bild machine) for his stock is in evidence as Plaintiff's Exhibit No. 14, introduced on page 134, Vol. I, of the record and is to be found at page 503, Vol. II of the record.

Mr. Hulseman's contract with Paper Cup Corporation, transferring that license and that machine to the corporation in consideration for his shares of capital stock of the corporation is Plaintiff's Exhibit 15, introduced on page 136, Vol. I, and the exhibit is to be found at page 502, Vol. II, of the record.

The assignment of the invention and patent application is Plaintiff's Exhibit 19, introduced at page 138, Vol. I, of the record and is to be found at page 521, Vol. II of the record.

Hulseman Covenanted to Defend.

In Mr. Hulseman's contract with Paper Cup Corporation, transferring the Smith and Bild exclusive license and machine to the corporation in consideration of the issuance to him of his capital stock in the corporation, Mr. Hulseman (Rec. 507, Vol. II), agreed that:

> "said Hulseman does, for himself, his heirs, executors, administrators and assigns, covenant to and with said Paper Cup Corporation to *warrant and de-*

fend said property to the said Paper Cup Corporation, its successors and *assigns*, against the lawful claims and demands of any and every person, firm or corporation, whom or whatsoever." (Emphasis ours.)

Mr. Hulseman is now trying to destroy the very "property" which he there *covenanted* to *defend*. The exclusive rights which he acquired from Smith and Bild, and then assigned to Paper Cup Corporation, merged into the greater rights secured by Paper Cup Corporation under that assignment. There never was a time when Paper Cup Corporation did not own those exclusive rights, until it conveyed them to respondent. The title to the Smith and Bild invention, application and patent included the exclusive license rights that Hulseman had conveyed to the corporation.

Mr. Hulseman testified that *he* handled all of those subsequent contracts and his signature appears upon all of them. He also, for the corporation, handled the matter of securing the assignment (Rec. 136, Vol. I).

Hulseman Directed and Controlled Paper Cup Corporation.

On page 138, Vol. I, Mr. Hulseman testified that he became the first president of Paper Cup Corporation; remained president of it until December 31st, 1935, or thereabouts; that he had charge of its operations; was a director, and was the *sole managing officer* of it (See findings of fact No. 40, Rec. Vol. II, p. 757).

The foregoing record facts make Mr. Hulseman *far more* than a mere "minority" stockholder, as petitioner would have this Court believe.

Furthermore, he had obligated himself by a solemn written covenant to *defend*,—not to *destroy*,—this "property".

The foregoing facts are *not* set forth in the petition.

Paper Cup Corporation assigned this invention, the Smith and Bild application, and the patent to issue thereon to respondent on July 7, 1939 (Rec. 536, Vol. II, introduced p. 172, Vol. I). This was after Mr. Hulseman severed his connection with Paper Cup Corporation. However, Mr. Hulseman's written obligation to "warrant and defend" this "property", in express terms, extended to *assignees* of the Paper Cup Corporation, as above pointed out (Rec. 507, Vol. II, lines 34 to 40).

Continuous Feed Claims.

Petitioner, on pages 4, 5, 6 and 7 of its petition, tries to make it appear that claims covering the feature of *continuously advancing the strip* of paper, were not present in the Smith and Bild application, when Paper Cup Corporation turned over the prosecution of the application to the present firm of attorneys who represent respondent. On page 5, of its petition, that date is given as September 19, 1935. Mr. Hulseman was then president of Paper Cup Corporation and, so far as the record shows, was in full charge and control of its activities (Rec. 138, Vol. I). If Mr. Hulseman had nothing to do with that transfer of the prosecution of the Smith and Bild application, petitioner's counsel could have asked him about it. They did not ask him. The fact is that he had a lot to do with it. It was officially done by him.

But, regardless of the foregoing facts, petitioner is WHOLLY in error when it says that no claims to the "con-

tinuous feed" were in the application when that transfer of the prosecution of the application took place. We shall later point out that it makes no difference whether such claims were or were not in the application, but the record shows that they were not only *in the application* at that time but that *one* of those very claims issued in the patent as claim 7.

In discussing this phase of the petition, we shall refer to Volume IV of the record which contains the file wrapper of the Smith and Bild application which resulted in the issue of the Smith and Bild patent here in controversy.

The power of attorney to new counsel appears on page 1695 of Vol. IV of the record. Prosecution of the application prior to that date was handled by Cox & Moore. Subsequent to that date (September 19, 1935) it was handled by the Firm of Charles W. Hills.

In the first action, dated March 8, 1935 (Rec. 1683, Vol. IV), the claims which made reference to the continuous movement of the strip of paper, were rejected on the Searle patent No. 1,375,937. The Searle patent is in evidence in this case and appears at page 1148, Vol. III, of the record. Searle makes *no* disclosure of "continuous feeding of a strip of paper". The rejection must, therefore, have been based upon other grounds of rejection.

On page 1684 of Volume IV, original Claim 2 was rejected because the claim said "uninterrupted continuous movement", and the Examiner pointed out that "the portion of the paper adjacent the line of cut (is) momentarily stationary".

Claim 2 was cancelled in the amendment filed by Cox & Moore on September 9, 1935. But, in that same amend-

ment, Cox & Moore inserted 14 new claims. One of those new claims, claim 34 (Rec. 1690, Vol. IV) states,

"successively severing the strip *as it travels,* etc."

That claim, which became claim 7 of the patent, carries the idea of "continuous movement" of the strip even though it does not use the specific words "continuous movement." Within a few days *after* that amendment was filed, Paper Cup Corporation, *while Mr. Hulseman was still president* and dominated and controlled its activities, turned over the prosecution of the application to the Firm of Charles W. Hills (Rec. 1695, Vol. IV).

Later, during the prosecution of the application before the *same* Examiner in the Patent Office (Rec. 1750, Vol. IV) the Examiner stated:

> "Claim 57 is further inaccurate in that applicant's feed rolls 14, 16 do not intermittently move the web as claimed. These rolls *continuously* move the web." (Emphasis was Examiner's.)

Again, at the top of page 1751, Volume IV of the record, the Examiner, in rejecting claim 55, which issued as claim 15 of the Smith and Bild patent, said:

> "Applicant's feed rolls continuously move the web; they do not intermittently move it as recited in this claim."

This claim was allowed after cancellation of the word "intermittently", and became claim 15 of the patent.

The Examiner thus found it to be a fact that, in the Smith & Bild machine, the *web* moves "continuously." The lower Court, by inference, found that same thing to be a fact when it found the Smith & Bild claims valid and infringed, and the Circuit Court of Appeals found it to

be a fact. We therefore have *three* concurrent *findings of fact* on that question.

It is impossible not to have a continuous movement of the web of paper in the Smith & Bild machines. The feed rollers 14 and 16 are geared together and *move* "continuously". The web of paper is gripped firmly between those feed rollers and, since the rollers move "continuously", the web *must* also move "continuously". The Circuit Court of Appeals, on page 1817, Vol. IV, of the record analyzed petitioner's contention which it is pressing here, and said:

> "We think this distinction is more imaginary than real."

and

> "The testimony discloses that the halting effect, if any, occasioned by plaintiff's cutting mechanism, is so insignificant as to have little, if any, effect upon the paper's advancement."

Petitioner, on page 7 of the petition, incorrectly states that, as to that feature,

> "no claim was or properly could have been present in the application at the time Mr. Hulseman severed his connections with Paper Cup Corporation."

That statement is definitely incorrect. Such a claim was not only *proper* at that time but such a claim *was then in the case.* From the day the application was filed until it issued into the patent in suit, *there never was a time when the application did not have a claim in it which covered the continuous feed feature.*

The petitioner, on page 7 of the petition, contends that this is a case in which "public interest" was ignored. "Public interest" does not require that Mr. Hulseman be

permitted to destroy the very thing which he *covenanted* to defend.

Petition Is Based Solely on Estoppel.

The estoppel which was found to exist in this case by both lower courts, was based upon *all* of the facts in the record, which create as clear a case of estoppel as was ever presented to a court. Even if Mr. Hulseman had not, in fact, *covenanted* to *defend* this "property", the other facts in the record fully establish the estoppel.

It is *only* on this ground of estoppel that the petition for Certiorari is based.

No Public Interest.

"Public interest" is a poor excuse for Mr. Hulseman to urge in this case. "Public interest" requires that Mr. Hulseman's conduct, shown by the record in this case, be condemned rather than rewarded.

Hulseman and Petitioner Are One.

Petitioner admits (Brief p. 17) that the petitioner corporation was organized by Mr. Hulseman; that he manages the petitioner corporation; and owns a majority of its capital stock.

The record shows that he is president of petitioner corporation; that he formed this corporation while he was working for respondent (Rec. 120, Vol. I; Findings of Fact, Nos. 38 and 44, Vol. II, pp. 757, 758); that when he employed Mr. Brewer to design petitioner's machines, he explained the "continuous feed" principle to Mr. Brewer while the Smith & Bild application was still pending in

the Patent Office (Rec. 141, Vol. I), and advised Mr. Brewer quite fully about the Amberg machine, which was just an improvement upon the Smith & Bild, and which incorporates the structure defined by the Smith & Bild claims now involved in this case.

It is not to the "public interest" to have the Courts approve Mr. Hulseman's conduct. Both the District Court and the Court of Appeals disapproved of that conduct in no uncertain terms.

ARGUMENT.

Petitioner has based its petition for certiorari solely upon the estoppel question. Petitioner has stated *no* grounds for securing certiorari in an ordinary patent case in which no question of estoppel is involved.

In its argument, petitioner appears to assume that "public policy" requires that patents be held invalid. We know of no such "public policy".

Controversy Is Private—Not Public.

This is a case in which the controversy is one between respondent and petitioner,—which is really Mr. Hulseman. The District Court found that "petitioner is a mere incorporation of Leo J. Hulseman" in Finding of Fact, No. 44 (Rec. 758, Vol. II). The Court of Appeals concurred in this finding of fact.

The estoppel which was found in this case is therefore applicable only to Mr. Hulseman and to petitioner.

Since the estoppel applies only to Mr. Hulseman and to petitioner, there is no "public interest", with respect to patents, in the case presented by the petition for certiorari, because the petition is based *solely* upon the estoppel question.

Petitioner's statement of facts with respect to the estoppel is so inaccurate and so incomplete that it does not fairly present the facts. Estoppels are based upon facts. We have presented the record facts upon which the District Court and the Circuit Court of Appeals based their concurrent findings of estoppel in this case.

In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, this Court had before it a case in which

petitioner endeavored to have this Court review a question of estoppel. This Court said, on page 178:

> "Whether respondents acquiesced in the infringement and are stopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508. *United States* v. *Johnston*, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14. *United States* v. *McGowan*, 290 U. S. 592. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464."

We have not been able, without unduly enlarging this reply, to present *all* of the record facts which support those concurrent findings of both of the courts which passed upon this issue in this case. We have, however, presented enough of the record facts to show that no error was committed.

There was no miscarriage of justice in this case. Petitioner cannot cite even one instance where facts, such as are present in this case, were held insufficient to create an estoppel.

Both the District Court and the Circuit Court of Appeals correctly applied the law relating to estoppels to the facts in the case at bar.

Estoppel is Only Question Presented.

It should be kept in mind that petitioner has based its petition *solely* upon the ground that the decision of the Circuit Court of Appeals with respect to *estoppel* should be reviewed. That is evident from the fact that, in paragraph 8, which starts on page 2 of the petition, the petitioner states:

> "The Circuit Court of Appeals sustained the Smith and Bild patent as valid, not because it found invention disclosed thereby, or that the patent had been validly granted, but *solely because it concluded that petitioner was estopped to attack the validity of the patent.*" (Emphasis ours.)

The question of *estoppel* is therefore the *sole* question presented by this petition. That question is therefore one which is of interest *solely* between respondent and Mr. Hulseman and his privies, of which the petitioner is one. The *public* is not interested, one way or the other, in whether Mr. Hulseman and his privies are estopped, by deed or by conduct, to deny the validity of the Smith and Bild patent.

Petitioner's arguments based upon an alleged "public interest" are not pertinent in this case.

Estoppel Here Found Has Broader Basis Than Merely Estoppel of a Licensee.

Furthermore, while an ordinary *licensee* has very properly been held to be estopped in ordinary *licensee* cases, this case is one in which the *estoppel* is based upon *more* than the fact that Hulseman and Paper Cup Corporation were *licensees*. On that ground alone, there was more than an adequate basis for applying the estoppel.

But, here, Mr. Hulseman had actually "covenanted" to defend Paper Cup Corporation and its "assignees" with respect to the title to the exclusive rights to this very invention. This is a case of estoppel by deed, as well as by conduct.

The ordinary assignment of a patent does not contain a "covenant" to *defend* the invention. That obligation is implied in the ordinary case. Here it is present in the

form of an express written agreement, *signed by Mr. Hulseman.*

Petitioner argues, on page 16 of the petition, that Mr. Hulseman should be permitted to continue his inequitable conduct because the public needs the paper cups which Mr. Hulseman is making and selling. There are others who can rightfully and lawfully supply the public with those very cups. Furthermore, Mr. Hulseman (petitioner) could supply those very cups without infringing these Smith and Bild claims. Petitioner's argument on this point is really praise for the Smith and Bild invention.

Petitioner's Authorities.

We shall now discuss some of the authorities relied upon by petitioner and shall cite one other pertinent decision.

Petitioner Relies Upon Decisions Which Were Overruled on Very Point Relied Upon by Petitioner.

Petitioner's argument under Point II, on page 17 of its petition, is wholly irrelevant in this case because it is not based upon all of the record facts.

On page 17 of its petition, petitioner cites and relies upon *Westinghouse* v. *Formica*, 288 Fed. 330, on the question of estoppel. This court took that very case, and pointed out the error of the Circuit Court of Appeals on this question of estoppel. This court held the assignor of that patent estopped to deny validity. *Westinghouse Electric & Manufacturing Company* v. *Formica Insulation Company*, 266 U. S. 342.

In that decision this Court said:

> "The analogy between estoppel in conveyances of land and estoppel in assignments of a patent right is clear. If one lawfully conveys to another a patented right to exclude the public from the making, using and vending of an invention, fair dealing should prevent him from derogating from the title he has assigned, just as it estops a grantor of a deed of land from impeaching the effect of his solemn act as against his grantee. The grantor purports to convey the right to exclude others, in the one instance, from a defined tract of land, and in the other, from a described and limited field of the useful arts."

This court then discussed the effect of the estoppel when the assignment was made prior to the issuance of the

patent. This portion of the opinion begins on page 352 of the report. In that case, the assignment had been made while the application was pending. This court held the assignor estopped to deny validity. This court said, on page 354:

> "If this two-step process was new, and the estoppel requires us to hold as against O'Conor that it was, his assignee had a right to claim the application of it as new, not only to flat articles of composition but also to non-planiform articles as in the 11th and 12th claims; for though O'Conor *had not made such a claim,* his original specification foreshadowed it as reasonable." (Emphasis ours.)

In the case at bar, the original specification foreshadowed the "continuous feed" claims as reasonable. In fact, such claims were *always* in the case, as we have pointed out above.

Petitioner states that this court did not pass upon this question in *Westinghouse* v. *Formica,* 266 U. S. 342. That statement is *wholly incorrect.* There, O'Conor had assigned his application *while it was pending* in the Patent Office. This court held that O'Conor was estopped to deny the validity of claims *which were inserted after the assignment.*

The Circuit Court of Appeals, in the case at bar, had the Supreme Court decision in *Westinghouse* v. *Formica* before it and carefully and accurately followed that decision.

No Diversity of Opinion.

There is no diversity of opinion on this question of estoppel as it is presented in the case at bar.

In *Vogt Instant Freezers* v. *New York Eskimo Pie Corp.,* 59 Fed. (2d) 99, (cited by petitioner), the *lower court* did

say that there was no estoppel, and incorrectly cited this court's decision in *Westinghouse* v. *Formica* as sustaining that position.

That District Court decision was reversed by the Circuit Court of Appeals for the Second Circuit in 69 Fed. (2d) 84. That Circuit Court of Appeals, beginning at the bottom of page 86 of the report, held that the assignor *in that case was* estopped to deny validity of the patent there in suit, and cited this same Supreme Court decision, *Westinghouse* v. *Formica,* 266 U. S. 342 as sustaining that view.

There is no diversity of opinion in the different circuits when the Circuit Courts of Appeal are in harmony, even though a *reversed* District Court opinion might be to the contrary in one of those circuits.

The Circuit Court of Appeals for the Second Circuit corrected the District Court on this question of estoppel in the Vogt case. This court corrected the Circuit Court of Appeals for the Sixth Circuit on this question of estoppel in the Westinghouse case. There is therefore unanimity of opinion in the three decisions of the Seventh Circuit (in the case at bar); the Circuit Court of Appeals for the Second Circuit (in the Vogt case); and the Supreme Court (in the Westinghouse case).

The estoppel in the case at bar is even stronger than in the Vogt case or in the Westinghouse case. Here, there is an *express* covenant, instead of an *implied* covenant, as was present in those cases.

Hulseman's Possession of Exclusive Rights Was NOT "Casual" or "Temporary."

Petitioner argues (Brief p. 19) that Hulseman's possession of title was only "casual and temporary". That

statement is incorrect. That ownership by Hulseman gave him 49% of the capital stock of Paper Cup Corporation outright, and gave his attorney 2%; it gave Mr. Hulseman complete control of the corporation; it made him a director and president of the corporation, and it made him general manager of all of its affairs.

The effect of that "ownership" was neither "casual" nor "temporary".

The decision in *Picard* v. *United Aircraft Corporation,* 128 Fed. (2d) 632, and the concurring opinion in that case by Judge Frank (cited by petitioner) do not apply to any state of facts which is present in the case at bar. We cannot find that any question of estoppel was there involved. Both the opinion of the court and the concurring opinion by Judge Frank are interesting and scholarly, but we cannot see where that case has any bearing upon the case at bar.

The erroneous policy suggested in the last paragraph on page 19 of the petition would protect an assignee, who is clearly estopped, if he merely placed a corporate cloak around his shoulders, as Hulseman did in the case at bar. Equity never has countenanced the protection of wrongdoers. There is no reason why it should do so now.

Hulseman Covenanted to Protect ASSIGNEES of Paper Cup Corporation.

We have heretofore pointed out that the true facts in this case are not as petitioner relates them. The District Court and the Circuit Court of Appeals, basing their findings upon the complete facts in the record, found that Hulseman and petitioner are merely one and the same. Petitioner is merely a cloak under which Hulseman is carrying on his inequitable business.

As we have pointed out heretofore in this brief, Hulseman "covenanted" to defend *assignees* of Paper Cup Corporation. That covenant was not limited to those who became *assignees* while Hulseman continued to be president of Paper Cup Corporation. It covers those who became *assignees*, at any time, of the exclusive rights which Hulseman had conveyed to Paper Cup Corporation for his capital stock.

Regardless of petitioner's urgings, courts of equity will not become blinded to realities. They will continue to look through the shadow and find the substance which casts the shadow.

Concurrent Decisions.

This Court has repeatedly said that findings of fact concurred in by two lower courts will be accepted by this Court unless clear error is shown. *Radio Corporation of America* v. *Radio Engineering Laboratories, Inc.*, 293, U. S. 1.

In the case at bar, the findings of fact, upon which both the District Court and the Court of Appeals based their decisions, were *concurrently found to be facts.* (See opinion of Court of Appeals, first paragraph at top of Rec. 1814, Vol. IV.) They both applied the law correctly to those facts.

The petitioner is not accepting the facts, as found by the lower courts, and then merely questioning the application of the law to those facts. The petitioner is questioning the concurrent findings of facts.

Some of the findings of fact, and particularly the finding with respect to the "continuous movement" of the web of paper through the feeding mechanism in the Smith and Bild patent, were also found to be *facts* by the Examiner in the Patent Office. He is an expert in such matters.

It is hardly reasonable to assume that the Examiner, the District Court, and the Court of Appeals could all be wrong as to the facts, and that petitioner is the *only one* who is right.

The same contentions which are made here were made by petitioner in both the District Court and in the Court of Appeals, and neither one of them agreed with petitioner.

Conclusion.

We submit that the petition for certiorari is without merit, and should be denied.

Respectfully submitted,

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Dated: Chicago, Illinois.
November 20, 1942.